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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~6744~~ 70-5082

LAVERNE CARTER, et al.,

Appellants,

v.

WAYNE STANTON, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR APPELLANTS

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OPINION BELOW

The opinion of the United States District Court for the Southern District of Indiana, consisting of its Amended Entry on Motions to Dismiss, is unreported.

JURISDICTION

The judgment of the District Court was entered on November 24, 1970, and amended on December 11, 1970, and notice of appeal was filed in that court on January 19, 1971. This appeal was docketed on March 16, 1971, and

probable jurisdiction was noted and appellants' motion for leave to proceed in *forma pauperis* was granted on May 24, 1971. The jurisdiction of the Supreme Court to review the District Court decision by direct appeal is conferred by 28 U.S.C. § 1253. → denial of interlocutory or perm. injunction by 3 judge court.

QUESTIONS PRESENTED

1. Whether substantial constitutional and federal questions are raised by a challenge on equal protection, due process, right of privacy and statutory grounds to a state regulation and practice which defines "continued absence" in such a manner as to deny AFDC benefits to children whose parents have been separated for less than six (6) months, except where undefined exceptional circumstances of need are present or where the parent having custody of the child files an action for divorce or legal separation.

2. Whether welfare claimants in an action under 42 U.S.C. § 1983 seeking to enjoin and declare invalid on constitutional and statutory grounds a state regulation and practice which defines "continued absence" in such a manner as to deny AFDC benefits to children whose parents have been separated for less than six (6) months, except where undefined exceptional circumstances of need are present or where the parent having custody of the child files an action for divorce or legal separation, are required to exhaust state administrative remedies.

3. Whether a federal district court has jurisdiction under 28 U.S.C. § 1343 of an action brought pursuant to 42 U.S.C. § 1983 seeking to enjoin and declare invalid on constitutional and statutory grounds a state regulation and practice resulting in denials of AFDC benefits.

STATUTES INVOLVED

The following regulations, statutes and constitutional provisions are set forth in Appendix A hereto:

(1) Regulations pertaining to dependent children: Indiana State Board of Public Welfare Regulations 2-400 and 2-402, Burns Ind. Admin. Rules & Regs. (52-1001)-1 and (52-1001)-2 (1967).

(2) Statute and regulation pertaining to administrative appeals: Acts 1936 (Spec. Sess.), ch. 3, § 77, p. 12, Burns Ind. Stat. Ann. § 52-1246 (1964), and Indiana State Board of Public Welfare Regulation 2-113, Burns Ind. Admin. Rules & Regs. (52-1211)-1 (1970).

(3) Provisions of the Social Security Act of 1935: § 402 (a)(10), 49 Stat. 627, 42 U.S.C. § 602(a)(10), and § 406 (a), 49 Stat. 629, 42 U.S.C. § 606(a).

(4) Statutes governing the basis of the action and the jurisdiction of the District Court: 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4).

(5) Provisions of the Constitution of the United States: Amendment I, Amendment IV and Amendment XIV, Section 1.

Appendix B hereto contains a table which cross-references all sections of Burns Indiana Statutes Annotated cited herein to the corresponding sections of the Indiana Code of 1971.

STATEMENT

1. *The Statutory Framework.* The Aid to Families with Dependent Children (AFDC) program is one of the categorical public assistance programs established by the Social Security Act of 1935. 49 Stat. 620 *et seq.*, 42 U.S.C. § 301 *et seq.*[1] The Act authorizes federal support of state assistance to needy children when the children have been deprived

[1] A comprehensive discussion of the background and scope of the AFDC program is found in *King v. Smith*, 392 U.S. 309 (1968).

of the care or support of one or both parents through death, physical or mental incapacity, or continued absence from the home. The state of Indiana has elected to participate in this program[2] and has provided by statute that "assistance shall be given * * * to any dependent child * * *." Acts 1936 (Spec. Sess.) ch. 3, § 71, p. 12; Ind. Stat. Ann. § 52-1240 (1964). The Indiana State Board of Public Welfare, in its Regulation 2-400(a), has adopted the federal definition[3] that:

> "For the purpose of administration of assistance to dependent children, a dependent child means a needy child * * * who has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent, and whose relatives liable under the law for his support are not able to provide adequate care or support for such child without public assistance * * *."

Under Indiana law, an application for assistance for a dependent child is made to the county department of welfare of the county in which the child resides. Acts 1936 (Spec. Sess.), ch. 3, § 73, p. 12; Ind. Stat. Ann. § 52-1242 (1964). Upon receipt of such an application, the county department is directed to conduct an investigation of the circumstances of the child, including a visit to the home of the child and to the person having custody of the child. Acts 1936 (Spec. Sess.), ch. 3, § 74, p. 12; Ind. Stat. Ann. § 52-1243 (1964). A determination is then made of the eligibility of the child for assistance, the amount of which, giving due regard to the resources and necessary expenditures of the family and the conditions in each case, must be sufficient to provide the child "with a reasonable subsistence compatible with decency and health, taking into considera-

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[2] Acts 1936 (Spec. Sess.) ch. 3, § 14, p. 12; Ind. Stat. Ann. § 52-1113 (1964).

[3] Social Security Act of 1935 § 406(a); 49 Stat. 629; 42 U.S.C. § 606(a).

tion all needs essential to the well-being of the child." Acts 1936 (Spec. Sess.), ch. 3, § 72, p. 12; Ind. Stat. Ann. § 52-1241 (1969 Supp.). The county department is authorized periodically to reconsider the circumstances of a dependent child, and it may modify, cancel, revoke or suspend the assistance. Acts 1936 (Spec. Sess.), ch. 3, § 78, p. 12; Ind. Stat. Ann. § 52-1247 (1964). Each applicant is provided with a right to appeal any decision made by the case workers or supervisors at the county level, whether it be a denial of the right to file an application, a denial of assistance after the filing of an application, or dissatisfaction with the amount of the grant. Acts 1936 (Spec. Sess.), ch. 3, § 77, p. 12; Ind. Stat. Ann. § 52-1246 (1964). Appeals may be taken to the State Department of Public Welfare, and, thereafter, to the State Board of Public Welfare. Indiana State Board of Public Welfare Reg. 2-[illegible]3; Burns Ind. Admin. Rules & Regs. (52-1211)-1 (1970 Supp.).

The concept of "continued absence from the home" is not defined in the Social Security Act of 1935. The HEW Handbook of Public Assistance Administration § 3422.2 (1968) recommends "that no period of time be specified as a basis for establishing continued absence as an eligibility factor." Indiana State Board of Public Welfare Reg. 2-402 (b), Burns Ind. Admin. Rules & Regs. (52-1001)-2 (1967), adopted February 21, 1946, establishes such a time period, as follows:

> "When the continued absence is due to desertion or separation, the absence shall have been continuous for a period of at least six [6] months prior to the date of application for assistance to dependent children; except that under exceptional circumstances of need and where it is determined that the absence of a parent is actual and bona fide an application may be filed and a child may be considered immediately eligible upon a special finding of the county department of public welfare setting forth the facts and reasons for such action."

2. *Proceedings Below.* On February 27, 1970, appellants ("claimants") filed their complaint (App. 5) in the United States District Court for the Southern District of Indiana challenging the validity of Indiana State Board of Public Welfare Regulation 2-402(b) and the statewide practices thereunder on constitutional and statutory grounds and asking for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. The jurisdiction of the court was invoked under 28 U.S.C. § 1343(3) and (4). Claimants alleged that they are mothers whose children were rendered destitute through desertion or separation of the father. Each alleged that she applied for AFDC payments to the Marion County Department of Public Welfare and that she was denied either (a) the right to complete and file an application form, or (b) the grant of assistance. Claimants stated that the denial in each instance was on the ground that the mother must be separated from her husband for six months or file for divorce or legal separation before her children may receive AFDC benefits. Claimants contended that Regulation 2-402(b) and the practices thereunder are invalid in the following respects: (1) the six-month waiting period constitutes an irrational and arbitrary classification unrelated to the purposes of the AFDC program which violates the equal protection clause of the Fourteenth Amendment; (2) the exception contained in the regulation is permissive in nature and, hence, on its face grants an arbitrary and unlimited discretion to the county departments of public welfare in violation of the due process and equal protection clauses; (3) the regulation, as applied, in effect enacts an arbitrary and conclusive presumption which denies applicants an opportunity to prove their qualification for benefits in violation of due process of law; (4) the practice of requiring applicants to file for divorce or legal separation infringes their rights under the First, Fourth and Fourteenth Amendments and, in conjunction with the Indiana residency requirements for filing for divorce or legal separation, impairs their constitutional right to travel; and (5) the regulation is inconsistent with the Social Security Act of 1935 and is,

therefore, invalid and unenforceable. In addition, although not expressly set forth in their complaint, claimants contend that the admitted practice of referring applicants for AFDC benefits to the Indiana township trustees for general welfare relief during the first six months of a separation and of denying AFDC benefits on that basis (App. 202-204), which practice is urged by appellees ("defendants") as a justification for the six-month rule, is itself contrary to the Social Security Act of 1935.

Each of the defendants filed a motion to dismiss the complaint. (App. 18-19) The primary grounds of these motions were (1) lack of subject matter jurisdiction, and (2) failure to state a claim upon which relief could be granted. Defendants alleged in support thereof that claimants had failed to exhaust state administrative remedies and that their complaint failed to raise substantial constitutional questions. A three-judge court was convened, and a hearing on these motions was held on November 23, 1970, at which the following testimony was adduced:

A. *Filing of AFDC Applications.* The claimant Lucy Hall (App. 158) and the witness-applicants Marthena Tanner (App. 70), Sandra Watkins (App. 80) and Jean Luke (App. 91) each testified that she was denied the right to complete and file an application for AFDC benefits on the ground that she had either to be separated for six months or file for legal separation or divorce. The witness-attorney Charles Dieter testified that between February 1969 and September 1970 he stated to the welfare department that he was going to file for divorce or legal separation for approximately 100 persons in order that such persons would be allowed to apply for AFDC benefits (App. 40) and, to the best of his knowledge, he never "represented a person who had the six months waived for them without a divorce or legal separation." (App. 46). This testimony conflicts with the testimony of the defendant Stanton that the Marion County Welfare Department has no policy that requires filing for divorce or separation in order to make application for assistance (App.

191) and with the testimony of defendants' witnesses Ernest McGruder (App. 49, 64), Keith Eugene Carver (App. 176) and Lois Hartzler (App. 187).

B. *Denial of Aid.* The claimants Susan Bowman (App. 115-116) and Lucy Hall (App. 156) and the witness Jean Luke (App. 91-92) each testified that she was denied AFDC benefits on the ground that she had either to be separated from her husband for six months or file for legal separation or divorce. The claimant Bowman filed four applications for assistance before she was finally granted aid six months after her separation. (App. 118) The witness Luke also began receiving aid six months after her separation. (App. 92) The claimant Laverne Carter and the witness Tony Davis each stated that she was denied aid on the basis of the six months' rule (App. 100, 129), and the form of denial sent to Carter was admitted into evidence as plaintiffs' Exhibit 1. Although the defendant Stanton denied that there was any policy conditioning the grant of aid on the filing of a complaint for divorce or separation (App. 192), defendants do not deny that this is a factor which they consider in determining whether a separation is bona fide. (App. 179, 192).

C. *Statewide Practices.* Counsel for claimants offered into evidence certain depositions of persons residing in the state of Indiana in counties other than Marion County for the purpose of proving "a general state wide application or misapplication of the regulation and of a wide spread policy requiring applicants to initiate actions for divorce or legal separation as a condition to receiving aid." (App. 166) This motion was never ruled upon by the District Court. (App. 166).

D. *Waiver of Six Months' Rule.* Defendants' witness McGruder testified that a random study indicated that 30-34 waivers of the six months' rule had been granted in a six month period. (App. 52-53) He recognized that such waivers must be based on exceptional circumstances, but was unable to define the term. (App. 55) He later testified

that the standard of need is the same for a person who has been separated for less than six months as for one who has been separated for a longer period. (App. 59) Defendants' witness Carver testified that "if there is undue hardship or need then the six months separation can be waived." (App. 176) Upon cross-examination, he was unable to define "undue hardship" except to state that "if a woman has nine children and no means of supporting herself, that is an undue hardship" (App. 180) and that pregnancy is a common ground for waiver. (App. 181) He declared that, in cases of hardship, need takes priority over the question of bona fide separation. (App. 183) The defendant Stanton initially testified that the standard of need is identical regardless of the duration of the separation. (App. 192) On cross-examination, he declared that the term "exceptional circumstances"

> "means that a person has financial need, that there are circumstances that indicates the person's need is going to continue and is of some severity, and as far as basic necessities it means that the needs for this household may be very numerous and of considerable magnitude, but it might be variable, it might involve several types of needs, medical or emotional or academic depravations or social depravation, it could mean many things." (App. 198)

He further testified that the case workers do make a mental evaluation of hardship "which is many times quite apart from the per se dollar amount in this chart." (App. 203)

E. *Assistance from Township Trustee.* The defendant Stanton, in response to questioning by the Court, testified that the primary responsibility for the first six months of a separation belongs to the Township Trustee. (App. 204) The six-month period, thus, is related to the availability of assistance from the Trustees, and the need arises when the Trustee "stops giving assistance and says I'm not going to give you the assistance I was before." (App. 202) The defendant Stanton further stated that "we do not make a judgment as to the adequacy or inadequacy of the Township Trustee assistance." (App. 204).

During the first six months the claimant Bowman was separated from her husband, she received from the Township Trustee a weekly $15.00 grocery order. (App. 116) After her fourth application for AFDC benefits was granted, she began receiving $125.00 per month in such benefits. (App. 118) The witness Watkins received a $21.00 food order and one month's rent from the Trustee. (App. 81) She began receiving AFDC benefits three months after her separation in the amount of $200.00 per month. (App. 84) The witness Luke began receiving AFDC benefits in the amount of $125.00 per month six months after her separation. (App. 93) Prior to that time, she received food stamps from the Trustee. (App. 92).

F. *Administrative Appeal.* None of the claimants exercised her right to appeal the denial of benefits by the Marion County Welfare Department. (App. 194) The only witness to take an administrative appeal was Tony Davis, (App. 100), and her appeal was unsuccessful. The witness McGruder testified that "I don't think they stipulate what they [appeals] are based on" and that he did not remember reading any decisions "where any quotes have been made * * * relative to the constitution." (App. 62)

3. *Judgment of the District Court.* On November 24, 1970, the District Court entered its order (App. 206) dismissing claimants' complaint "for failure of federal jurisdiction." The Amended Entry on Motions to Dismiss (App. 210) was entered on December 11, 1970. In pertinent parts, the orders are identical, and the basis of the Court's action is stated as follows:

> "We therefore conclude that none of the plaintiffs appealed the various decisions made at the office level of the County Department. Having so failed to exhaust the administrative appeal procedures provided, we find a failure on the part of the plaintiffs to exhaust their administrative remedies through the state administrative procedures.
>
> "We have examined the pleadings before us and find no substantial federal question involved, nor

do we find federal jurisdiction under 28 U.S.C. §§ 1343(3)(4), 2201 and 2202." (App. 212)

SUMMARY OF ARGUMENT

Claimants urge that the constitutional and statutory issues raised by their complaint are neither obviously without merit nor clearly unsound. There is a substantial constitutional question as to the validity of the six-month rule under the equal protection clause since "exceptional circumstances of need" are required to obtain a waiver. In addition, this provision is attacked as violative of the Social Security Act of 1935 and the HEW regulations since aid thereunder must "be furnished with reasonable promptness to all eligible individuals" and since neither sanctions such a waiting period. Furthermore, the six-month rule grants a standardless and arbitrary discretion to the welfare administrators, and, in those cases where adequate investigations are not made, it enacts a conclusive presumption which is void under the due process clause. The alleged practice of requiring applicants to file for legal separation or divorce to secure a waiver of the six-month rule is attacked as contrary to the basic civil right of marriage, to the First Amendment and to the constitutional right of travel. It also conflicts with the goal of the Social Security Act "to help maintain and strengthen family life." Finally, claimants urge that the admitted policy of placing primary responsibility on the Township Trustee for relief during the initial six months of a separation is itself contrary to the Social Security Act. The foregoing questions, not being insubstantial, are adequate to support federal jurisdiction.

Since claimants are proceeding under 42 U.S.C. § 1983, the decisions of this Court indicate that they are not required to exhaust state administrative remedies. Section 1983 provides a remedy that is "supplementary" to any state remedy where, as here, important federal questions are involved. In addition, exhaustion is not required where the state remedy is inadequate and futile. The state admin-

istrative remedy herein has many inadequacies, and the evidence demonstrates that any pursuit thereof would be futile. Moreover, the general policy considerations which underlie the exhaustion requirement have no relevance in this case.

Since the complaint raises substantial constitutional questions, the District Court had jurisdiction under 28 U.S.C. § 1343(3). Welfare rights are "personal rights" within the *Hague* distinction, and the District Court had pendent jurisdiction over the statutory claims. Even if the complaint fails to raise substantial constitutional questions, however, the court had jurisdiction of the substantial statutory issues under §§ 1343(3) and (4). The Social Security Act is a law "providing for equal rights," and, more importantly, the legislative history indicates that, despite the differences in language, the scope of § 1343(3) was intended to be co-extensive with the actions authorized by § 1983. Thus, § 1343(3) provides jurisdiction for all causes of action under § 1983. Furthermore, jurisdiction over statutory welfare claims exists under § 1343(4) since both the Social Security Act and § 1983 itself are acts "providing for the protection of civil rights."

ARGUMENT

I.

THE COMPLAINT PRESENTS SUBSTANTIAL CONSTITUTIONAL AND FEDERAL QUESTIONS SINCE THOSE QUESTIONS ARE NEITHER CLEARLY UNSOUND NOR FRIVOLOUS.

In dismissing the complaint in this action, the District Court did not resolve the merits of any of the attacks made by claimants upon Regulation 2-402(b) of the Indiana State Board of Public Welfare. It found, based on the pleadings and the evidence introduced at the November 23 hearing, that those questions were insubstantial. The issue before this Court, therefore, is not the ultimate disposition of the constitutional and statutory questions raised by the com-

plaint, but whether those questions are of sufficient substance to support federal jurisdiction.

The principles to be applied in appraising the substantiality of the questions involved herein are well-defined by the decisions of this Court. Lack of substantiality appears only when a question "is obviously without merit or * * * its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject," *Water Service Co. v. Redding*, 304 U.S. 252, 255 (1938), or prior decisions render the claim "frivolous." *Bailey v. Patterson*, 369 U.S. 31, 33 (1962). Claimants submit that it is plain that neither of these criteria are applicable to the substantive issues of this case.

A. Substantial Questions Are Presented With Respect to the Validity of Regulation 2-402(b) on its Face.

Claimants challenge the validity of Regulation 2-402(b) on its face, as well as the practices thereunder. The purpose of the AFDC program is to provide support for all needy children who have been deprived of parental support or care by reason of continued absence from the home. Indiana State Board of Public Welfare Reg. 2-400, Burns Ind. Admin. Rules & Regs. (52-1001)-1 (1967). Continued absence from the home may arise from desertion or separation of a parent, incarceration of a parent or service of a parent in the armed forces. Dependent children in each of these three classes may be equally needy and equally deprived of the care and support of a parent, but Indiana denies aid to children in the first of these classes until six months has elapsed, unless *exceptional* circumstances of need are present and it is determined that the separation is actual and bona fide.[4] Thus, the effect of the six-month rule is to

[4]There is a durational requirement of three months where the absence is due to incarceration, unless the sentence equals 90 days or more. The county authorities may waive this requirement however, without finding exceptional circumstances of need. There is no

create two classes of needy children indistinguishable from each other except for the duration of the separation of the father. *Cf. Shapiro v. Thompson*, 394 U.S. 618 (1969). This is vividly demonstrated by the testimony of the claimant Bowman and the witness Luke in this case, each of whom was denied benefits until the six-month period elapsed and each of whom then began receiving aid. Such a classification bears no reasonable relation to whether a child in fact is deprived of parental care and support. Rather, for applicants who cannot establish exceptional circumstances of need, the denial of benefits falls most heavily upon those whose separation is genuine and who, therefore, can least endure the denial of benefits for six months. For these reasons, claimants submit that Regulation 2-402(b), on its face, constitutes an arbitrary denial of the equal protection of the laws under the Fourteenth Amendment, even under a test which searches only for rationality and invidious discrimination. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). The state concerns of preventing fraud and assuring that separations are continued do not justify such a broad and over-inclusive denial of benefits, *Shapiro v. Thompson*, 394 U.S. 618, 631, 636 (1969), *King v. Smith*, 392 U.S. 309, 325-327 (1968), in lieu of adequate investigations by the welfare authorities.[5]

durational requirement where the absence is due to service in the armed forces. Indiana State Board of Public Welfare Reg. 2-402(c) and (d), Burns Ind. Admin. Rules & Regs. (52-1001)-2 (1967).

[5] That such investigations can be made is evident from the many "waivers" for exceptional circumstances testified to by defendants' witness McGruder, in each of which a finding that the separation was actual and bona fide was presumably made in accordance with Rule 2-402(b). In fact, the Indiana Public Assistance Manual sets forth in some detail the exact procedures to be followed, Section III-C-6 B2 of which provides:

> "Absence of a parent because of desertion, abandonment, or separation shall have been continuous for a period of at least six months prior to the date of application.
>
> "Under exceptional circumstances of need and where it is determined that the absence of a parent is bona fide an

Claimants also assert that the six-month requirement, on its face, violates the Social Security Act of 1935 and the regulations thereunder in three respects. Section 402(a)(10) of the Act, 49 Stat. 627, 42 U.S.C. § 602(a)(10), requires that "aid to families with dependent children * * * be furnished with reasonable promptness to all eligible individuals * * *." Regulation 2-402(b) obviously thwarts this Congressional mandate. This conclusion was reached in *Doe v. Hursh*, 2 Pov. L. Rep. ¶ 11,753 (D. Minn. 1970), in which the court held that the Minnesota three-month durational presumption was contrary to this section. In addition to the requirements of § 402(a)(10) of the Act, 45 C.F.R. § 206.10(3), 36 Fed. Reg. 3864 (1971), requires that decisions on applications be made within 30 days and that the assistance check or notification of denial of assistance be mailed within that period. The present case, therefore, is not unlike this Court's recent decision in *California Department of Human Resources Development v. Java*, 39 U.S. L. Week 4491 (March 27, 1971), in which it was held that a provision of the California Unemployment Insurance Code violated the command of 42 U.S.C. § 503(a)(1) that state unemployment compensation programs must "be reasonably calculated to insure full payment of unemployment compensation when due."

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application may be filed and a child considered immediately eligible upon a special finding of the county department setting forth the facts and reasons for such actions. For this special finding, the county department shall determine that the parent is absent from the home from visits to the home, court records, records of another agency, reports from neighbors, or correspondence; shall determine that need exists according to the Standards for Requirements and that there are no resources of any kind including assistance from relatives; and shall determine that there are no resources in the community to meet this need, from records of the township trustee and other community agencies."

Secondly, there is a substantial question as to the validity of the "exceptional circumstances of need" criterion under § 406(a) of the Social Security Act, 42 U.S.C. § 606(a). Under that section, any "needy" child who meets the dependency requirements is entitled to aid. There is no federal authority for the imposition of a higher standard of need on children whose parents have been separated for less than six months.

In addition, § 406(a) contains no waiting period, rigid or otherwise, to establish a "continued absence." Nor is such a provision found in the interpretation of the "continued absence" requirement by the Department of Health, Education and Welfare. See 45 C.F.R. § 233.90(c)(iii), 36 Fed. Reg. 3868 (1971). The HEW Handbook of Public Assistance Administration, Pt. IV, § 3422.2 (1968) provides:

> "3422.2. Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:
>
> 1. When the parent is out of the home;
>
> 2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
>
> 3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.
>
> A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return."

Section 3422.5 of the HEW Handbook recommends that "no period of time be specified as a basis for establishing

continued absence as an eligibility factor" for the reason that "absence which causes deprivation of parental care or support may be detrimental to the child when a parent has departed only recently." The HEW interpretation recognizes that it is the nature of the absence under all the surrounding circumstances that determines whether the absence is "continued." On this basis, following the reversal and remand of this Court in *Damico v. California*, 389 U.S. 416 (1967), the three-judge court held California's three-month waiting period invalid.[6] *Damico v. California*, 2 Pov. L. Rep. ¶ 10,478 (N.D. Calif. 1969). In the light of the foregoing provisions and decisions, a substantial question is raised as to the validity of the Indiana regulation under federal law.

Claimants challenge Regulation 2-402(b) on its face in yet another respect. Since there is no requirement in the Regulation that an investigation be conducted in each case to determine if an absence is actual and bona fide and if exceptional circumstances of need are present and since, even where such a determination is made, the authorities are given discretion as to whether to accept an application for filing,[7] it is contended that the administrators are granted a standard-less and arbitrary discretion which encourages and has permitted a capricious and invidious discrimination between persons allowed to apply for and receive welfare benefits and those denied applications or benefits. The testimony of defendants' witnesses demonstrates that among the welfare officials themselves there is uncertainty and confusion as to the meaning and application of the "exceptional circumstances" test. In those cases where an adequate

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[6] The California statute provided that no aid could be granted for a separation of less than three months. The regulation interpreted the statute to allow aid prior to the expiration of three months when legal action had been taken to terminate the marriage, or when a parent had been deported or incarcerated.

[7] Reg. 2-402(b) provides that in such circumstances "an application *may* be filed and a child *may* be considered immediately eligible * * *." (Emphasis added).

investigation is not made, furthermore, the effect of the regulation is to enact a conclusive presumption that separation for less than six months cannot constitute deprivation of parental care and support by reason of continued absence from the home. Such a conclusive presumption, as the HEW interpretation itself demonstrates, is not rational and is, therefore, void under the due process clause of the Fourteenth Amendment. *United States v. Romano*, 382 U.S. 136, 139 (1965); *Heiner v. Donnan*, 285 U.S. 312, 325 (1932). Again, the foregoing questions are neither obviously without merit nor frivolous.

B. Substantial Questions Are Presented as to the Validity of the Alleged Practice of Requiring Applicants to File for Legal Separation or Divorce to Secure a Waiver of the Six-Month Rule.

There is a substantial conflict in the evidence with respect to whether the Marion County Welfare Department has a policy or practice within the six-month period either (1) of denying persons the right to complete and file an application or (2) of denying assistance unless the mother files for divorce or legal separation. Claimants have alleged (App. 11) and testified that such a practice is followed, and the question was not resolved by the District Court as a matter of ultimate fact. Claimants submit that a full trial of this case is required to determine this factual issue, but that, for the purpose of determining if substantial legal questions are presented by claimants' allegation, such policy and practice must be deemed to exist.

Claimants urge that a practice of requiring applicants seeking AFDC benefits within the six-month period to file for divorce or legal separation invades their right of privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and their basic civil right of marriage, *Boddie v. Connecticut*, 401 U.S. 371 (1971), *Loving v. Virginia*, 388 U.S. 1, 12 (1967), since it forces them either to alter their marital status or to

encounter severe economic deprivation. Applicants of the Catholic faith must, in addition, choose either to act contrary to their religion or to subject their children to six months of deprivation. In the absence of a compelling state interest, the First Amendment to the Constitution of the United States prohibits the imposition by the state of any such arbitrary condition on the free exercise of religion. *Sherbert v. Verner*, 374 U.S. 398 (1963). Moreover, this practice, in conjunction with the Indiana residency requirements for the filing of divorce actions or actions for legal separation,[8] abridges and violates the equal protection rights and the right to travel of applicants who have not satisfied those requirements.[9] *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Claimants further assert that this practice is contrary to § 401 of the Social Security Act of 1935, one of the purposes of which is "to help maintain and strengthen family life * * *." 49 Stat. 627, 42 U.S.C. § 601. A requirement that encourages legal separation or divorce cannot be harmonized with this policy. Section 3422.5 Pt. IV, of the HEW Handbook of Public Assistance Administration (1968), for example, provides as follows:

> "It is recommended that State agencies not deprive children of their right to assistance by interposing as an additional eligibility factor a requirement that, before eligibility on a basis of continued absence can be determined, (a) legal action be taken against an absent parent * * *. Agency regulation * * * should not deprive a parent of the prerogative, exercised by

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[8] Indiana law requires that a petitioner for divorce or legal separation shall have been a resident of the state for one year and a resident of the county for six months preceding the filing of the petition. Acts 1873, ch. 43, § 7, p. 107, Ind. Stat. Ann. § 3-1203 (1968); Acts 1903, ch. 48, § 4, p. 114, Ind. Stat. Ann. § 3-1231 (1968).

[9] Claimant Susan Bowman alleged that she had not met these residency requirements at the time she was initially denied AFDC benefits. (App. 6).

> other members of the community, to arrive at decisions in accordance with his own best judgment. Conditions requiring that legal action be taken against an absent parent before eligibility can be established deflect agency practice from the objective of the aid to dependent children program. Because these conditions interpose barriers to establishing eligibility, the very need for assistance brings external pressure upon parents to take decisive steps (such as court action against a spouse) before they have had an opportunity to arrive at decisions according to their best judgment. Legal action taken by the parent to meet the agency's conditions may result in additional strains in relationships within the home, or may unwisely force the permanent severance of relationships with the absent parent. It is recommended, therefore, that the decision of one of the parents to assume parental responsibility without seeking support from the absent spouse, not be a barrier to receipt of aid to dependent children, if the children are otherwise eligible."

Thus, while legal action voluntarily undertaken by one parent against the other may be one relevant factor in determining whether there is a continued absence, any regulation or practice which encourages such legal action or makes it a prerequisite to the receipt of assistance is not permitted under the federal Act.

C. A Substantial Question Is Raised as to the Validity of the Admitted Policy of Placing Primary Responsibility on the Township Trustee for Relief During the Six-Month Period.

The defendants seek to justify the Indiana six-month regulation on the ground that assistance during this period is available from the Township Trustee and that needy families are not entitled to pick and choose from what agency they will receive relief. The Indiana township trustees are "overseers of the poor within their respective townships,"

Acts 1935, ch. 116, § 1, p. 432, Ind. Stat. Ann. § 52-144 (1964), and are authorized to provide medical and surgical assistance, pay for utility services and school lunches, Acts 1935, ch. 116, § 5, p. 432, Ind. Stat. Ann. § 52-148 (1968 Supp.), and to furnish temporary aid for the relief of immediate and pressing suffering. Acts 1935, ch. 116, § 7, p. 432, Ind. Stat. Ann. § 52-150 (1964).

The defendant Stanton has testified herein that the primary responsibility for the first six months of a separation belongs to the Township Trustee. (App. 204) In his opinion, need and deprivation under the federal Act arise only when the Trustee stops giving assistance. (App. 202) However, he admits that the welfare authorities "do not make a judgment as to the adequacy or inadequacy of the Township Trustee assistance." (App. 204) That such assistance is totally inadequate, when compared with the AFDC benefits available and actually paid, is conclusively demonstrated by the testimony of the claimant Bowman (App. 116) and of the witnesses Watkins (App. 81) and Luke (App. 92).

Defendants ask us to read the federal Act as if it incorporated the Indiana poor relief program as part of a unitary system and provided that, so long as any relief is available from the Trustee, regardless of its adequacy, there is no need sufficient to support the grant of AFDC benefits. The Social Security Act of 1935, of course, sanctions no such policy. It seems plain, therefore, that the welfare authorities have abdicated their responsibilities to needy children for the sake of administrative convenience. Far from justifying or supporting the six-month rule, the reliance placed on the Trustee merely raises substantial, independent federal questions which demand resolution.

II.

CLAIMANTS WERE NOT REQUIRED TO EXHAUST STATE ADMINISTRATIVE REMEDIES SINCE THEIR ACTION IS UNDER 42 U.S.C. § 1983 AND SINCE SUCH STATE REMEDIES ARE INADEQUATE.

The decisions of this Court establish that Section 1983 provides a cause of action independent of any and all state remedies. In *Monroe v. Pape*, 365 U.S. 167 (1960), the Court declared that one complaining of unlawful search and seizure by state officials could sue them in a federal court under 42 U.S.C. § 1983, notwithstanding the availability of similar remedies under state law. In *McNeese v. Board of Education*, 373 U.S. 668 (1963), it was held that the plaintiffs did not have to pursue and exhaust state administrative remedies before bringing their federal action. The majority, following the conclusion reached in *Monroe* (365 U.S. at 183) declared that § 1983 provides a federal remedy that is "supplementary" to any state remedy. (373 U.S. at 672) Although the inadequacy of the state remedy was an alternative ground of decision, *McNeese* makes it clear that the duty of a district court in an action pursuant to § 1983 is to decide the issues on the merits. The Court reiterated this principle in *Damico v. California*, 389 U.S. 416 (1967), a case which is remarkably similar to the present one. *Damico* was an action by welfare claimants under the Civil Rights Act attacking a California statute and regulation requiring that as a prerequisite for AFDC benefits, unless a suit for divorce had been filed, the desertion or separation of the father be of at least three months' duration. The District Court dismissed the complaint for failure to exhaust state administrative remedies, and this Court, without considering the adequacy or inadequacy of those remedies, held in a *per curiam* opinion that no exhaustion was required.

Defendant Sterrett has attempted to distinguish *Damico* on the ground that it involved the constitutionality of a state statute, rather than a state regulation, and that, therefore, its validity could not have been adjudicated in an

administrative hearing. This distinction is not based on any of the Court's language in the *Damico* opinion. More importantly, it is completely without sanction in the later decisions of this Court, which are directly to the contrary. The facts in *Houghton v. Shafer*, 392 U.S. 639 (1968), were that certain legal materials were confiscated from the petitioner-prisoner by the prison authorities pursuant to prison *rules*. Pennsylvania provided several levels of administrative appeals in such a case, up to the state Attorney General. The petitioner did not take any administrative appeal, but filed an action in the federal district court pursuant to 42 U.S.C. § 1983. In holding that exhaustion was not required, this Court in its *per curiam* opinion stated:

> "As we understand the submission of the Attorney General of Pennsylvania in this Court, the rules of the prison were validly and correctly applied to petitioner; these rules are further said to be strictly enforced throughout the entire correctional system in Pennsylvania. In light of this it seems likely that to require petitioner to appeal to the Deputy Commissioner of Correction, the Commissioner, or to the Attorney General would be to demand a futile act. In any event, resort to these remedies is unnecessary in light of our decisions in *Monroe v. Pape*, 365 U.S. 167, 180-183; *McNeese v. Board of Education*, 373 U.S. 668, 671; and *Damico v. California*, 389 U.S. 416." (392 U.S. at 640-41).

Similarly, in *King v. Smith*, 392 U.S. 309 (1968), the constitutionality of Alabama's substitute father *regulation* was attacked. In refusing to require any exhaustion of state administrative remedies, the Court stated (392 U.S., n. 4 at 312):

> "We reject appellants' argument that appellees were required to exhaust their administrative remedies prior to bringing this action. Pursuant to the requirement of the Social Security Act that States must grant AFDC applicants who are denied aid 'an opportunity for a fair hearing before the State agency,' 42 U.S.C. § 602(a)(4) (1964 ed., Supp. II),

> Alabama provides for administrative review of such denials. Alabama Manual for Administration of Public Assistance, pt. I, § II, pp. V-5 to V-12. Decisions of this Court, however, establish that a plaintiff in an action brought under the Civil Rights Act, 42 U.S.C. § 1983, 28 U.S.C. § 1343, is not required to enhaust aministrative remedies, where the constitutional challenge is sufficiently substantial, as here, to require the convening of a three-judge court. *Damico v. California*, 389 U.S. 416 (1967). See also *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Monroe v. Pape*, 365 U.S. 167, 180-183 (1961). For a general discussion of review in the federal courts of state welfare practices, see Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967)."

The substantiality of the constitutional challenges presented by claimants has been heretofore demonstrated. In such circumstances, the vast majority of the lower federal courts have construed the above cases as recognizing an absolute exemption under § 1983 from any exhaustion requirement.[10] There is a strong policy behind a flat no-exhaustion rule for welfare cases under § 1983 since the legal questions presented, as here, are essentially federal.[11]

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[10] See, for example, *Cooper v. Laupheimer*, 316 F. Supp. 264 (E.D. Pa. 1970); *Rodriguez v. Swank*, 318 F. Supp. 289 (N.D. Ill. 1970), affirmed, 39 U.S.L. Week 3533 (June 8, 1971); *Westberry v. Fisher*, 309 F. Supp. 12 (D. Maine 1970); *Gold v. Lomenzo*, 304 F. Supp. 3 (S.D. N.Y. 1969), reversed on other grounds 425 F.2d 959 (2d Cir. 1970); *Jenkins v. Georges*, 312 F. Supp. 289 (W.D. Pa. 1969); *Russo v. Shapiro*, 309 F. Supp. 385 (D. Conn. 1969); *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *Anderson v. Burson*, 300 F. Supp. 401 (N.D. Ga. 1968).

[11] One commentator has found that "most of the successful section 1983 cases present simple fact situations with a clear issue of federal law requiring limited, if any, evidentiary hearings." Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 Harv. L. Rev. 1352, 1355 (1970).

Not only are the federal courts likely to be more familiar with these questions than are the state welfare agencies and courts, but federal interpretation will lead to a more uniform application of the Social Security Act throughout the nation. Accordingly, there is no important state-law interest in having state administrative remedies resorted to first. Even if there is no absolute exemption, however, exhaustion is unnecessary here because the state remedy is inadequate and pursuit thereof would be futile.

It is well-accepted that exhaustion is not required where the administrative remedy is inadequate or futile. The claimants herein have challenged the validity of the Indiana regulation and practice on constitutional and statutory grounds. Although Indiana State Board of Public Welfare Regulation 2-113, Burns Indiana Admin. Rules & Regs. (52-1211)-1 (1970), provides that an appeal may be taken "if an applicant or recipient believes his civil or constitutional rights have been violated," paragraph (f) of the Regulation also requires that "appeal decisions * * * be based on the law, rules and regulations of the state department of public welfare, and officially adopted policies * * *." Claimants contend that this requirement permits no attack on the validity of other regulations or policies, and defendants have not suggested that it has any different meaning. Furthermore, it is unrealistic to presume that a department hearing officer, or the department itself, will declare a regulation invalid. The forum is not, and cannot be, a neutral and disinterested one. Defendants' witness McGruder testified that he did not remember reading any appeal decisions "where any quotes have been made * * * relative to the constitution." (App. 62) In response to questions concerning appeals pertaining to the issues involved herein, the defendant Stanton answered that "to the best of my knowledge, the Marion County Department of Public Welfare has been sustained in all of its decisions in this area." (App. 22) The defendant Sterrett answered that, of the four appeals filed in 1970 by persons denied relief under the six-month rule, two were heard and assistance was denied in each. (App. 27)

In these circumstances, any administrative appeal would be futile.

There are many procedural deficiencies in the state administrative procedure which render the administrative remedy inadequate.[12] The hearings are generally informal proceedings, and those types of relief which would be appropriate for implementing an adjudication on the legality of the regulation, such as injunctions and declaratory relief, are not available from the agency. An administrative appeal cannot be maintained as a class action. The inability to maintain a class action insulates from judicial scrutiny unconstitutional requirements which affect literally thousands of welfare applicants. Welfare practice is necessarily group practice. Even with federally sponsored legal services programs, the number of attorneys willing and able to serve such clients is severely limited. The class action is essential if the rights of these economically dependent citizens are to be protected. Finally, the state administrative procedure results in no published decision, no uniform statewide recognition and no binding body of law. Any decision, even if favorable, is purely *ad hoc*. In short, state administrative hearings have serious shortcomings which substantially limit their adequacy.

In addition to the foregoing, several of the purposes underlying the exhaustion doctrine have no relevance in this case. Where a regulation is attacked as invalid on its face, there is little need to develop a factual background. There are disputed facts concerning the alleged agency practice of requiring legal actions for separation or divorce, but these are facts related to agency policy and practice, not to the status and circumstances of applicants, and are more appropriately determined by a neutral tribunal. The answer to the attack made herein neither requires the agency to exercise its discretion nor to apply its expertise. Finally, given

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[12] See Note, *Federal Judicial Review of State Welfare Practices*, 67 Colum. L. Rev. 84 (1967).

the likelihood that the pursuit of administrative remedies would be futile, any consideration of judicial economy seems immaterial.

For these reasons, claimants urge that they were not required to exhaust state administrative remedies and that the District Court erred in dismissing their complaint on this ground.

III.

THE DISTRICT COURT HAD JURISDICTION OF THIS ACTION UNDER 28 U.S.C. §1343(3) SINCE THE COMPLAINT RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS.

Claimants invoked the jurisdiction of the District Court under 28 U.S.C. § 1343(3) and (4) providing for jurisdiction without regard to the amount in controversy when the protection of constitutional rights or equal or civil rights under an Act of Congress is involved. Claimants have demonstrated above that the constitutional questions raised by their complaint are sufficiently substantial to support the jurisdiction of the District Court. In these circumstances, this Court has made it plain, assuming *arguendo* that Mr. Justice Stone's distinction in *Hague v. C.I.O.*, 307 U.S. 496, 531-532 (1939)[13] retains some validity, that welfare rights are "personal rights" and that federal jurisdiction exists under § 1343(3).

The leading case is *Rosado v. Wyman*, 397 U.S. 397 (1970), which involved a challenge, on equal protection and statutory grounds, of a section of New York's Social Services Law providing for a method of reduction of monthly AFDC grants and allowances outside New York City but not for their increase. Unlike the present case, no claim was

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[13] In Justice Stone's words, § 1343(3) supports jurisdiction "whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights * * *." (307 U.S. at 531).

made in *Rosado* that the challenged law infringed any independent, personal constitutional liberties. The constitutional claim was declared moot prior to decision by the three-judge court, and, in finding that pendent jurisdiction over the statutory claim did exist in the single judge from the outset and that he did not abuse his discretion by exercising this jurisdiction, this Court clearly held that original jurisdiction was conferred by § 1343(3) because of the constitutional allegation in the complaint. Mr. Justice Harlan, writing for the Court, stated:

> "That the three-judge court itself not only had jurisdiction but would have been obliged to adjudicate this statutory claim in preference to deciding the original constitutional claim in this case follows from *King v. Smith*, 392 U.S. 309 (1968) * * * once petitioners filed their complaint alleging the unconstitutionality of § 131-a, the District Court sitting as a one-man tribunal was properly seised of jurisdiction over the case under § § 1343(3) and (4) of Title 28 * * * *." (397 U.S. at 402-403).

In *King v. Smith*, 392 U.S. 309 (1968) the Court expressly found jurisdiction under § 1343(3) where a welfare recipient challenged the validity of Alabama's "substitute father" regulation. Without explanation, the Court stated in a footnote that: "Jurisdiction was conferred on the court by 28 U.S.C. § § 1343(3) and (4)." (392 U.S. at 312 n. 3). In *Goldberg v. Kelly*, 397 U.S. 254 (1970) the constitutional allegation pertaining to a right to a prior hearing was grounded in the due process clause, but the gist of the deprivation was the loss of welfare benefits alone. In deciding that an evidentiary hearing was required before termination, the Court, without discussion, assumed that jurisdiction existed, apparently pursuant to § 1343(3). The nature of welfare benefits, however, was discussed, and these rights were defined as being in the nature of "entitlements," analogous to the license of a doctor or lawyer or the franchise of an automobile dealer. (397 U.S. at 262) These traditional entitlements have been held to be personal rights

within § 1343(3),[14] and the clear import of *Goldberg* is that welfare rights are equally personal. In addition to the above cases, the Court has rendered several other decisions in the welfare area without discussing or mentioning the jurisdictional basis thereof. *Shapiro v. Thompson,* 394 U.S. 619 (1969); *Dandridge v. Williams,* 397 U.S. 471 (1970); *Lewis v. Martin,* 397 U.S. 552 (1970); *Wyman v. James,* 400 U.S. 309 (1971).[15]

In the foregoing cases, the Court has recognized the fundamental fact that a denial of welfare aid, "upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life," *Shapiro v. Thompson,* 394 U.S. 618, 627 (1969), creates real restraints on personal freedom and endangers the basic qualities of life without which liberty is little more than a concept. This is especially true when children are affected.[16] Thus, within the *Hague* distinction, a denial of welfare payments does take on elements of personal deprivation defying valuation as well as elements of a purely proprietary nature.

[14] *Gold v. Lomenzo,* 425 F.2d 959 (2d Cir. 1970) (deprivation of real estate broker's license); *Mansell v. Saunders,* 372 F.2d 573 (5th Cir. 1967) (deprivation of garbage collection franchise); *Hornsby v. Allen,* 326 F.2d 605 (5th Cir. 1964) (deprivation of tax license).

[15] Included among the many lower court decisions upholding or assuming federal jurisdiction over welfare claims under § 1343(3) are at least two decisions by other three-judge panels in the Seventh Circuit. *Alvarado v. Schmidt,* 317 F. Supp. 1027 (W.D. Wis. 1970); *Alexander v. Swank,* 314 F.Supp. 1078 (N.D. Ill. 1969), probable juris. noted, 401 U.S. 906 (1971).

[16] Even Judge Friendly, who would retain the *Hague* distinction, in seeking to rationalize the same with recent decisions was compelled to conclude that a denial of AFDC benefits may not only cause economic loss to children, but may also infringe their "liberty" to grow up with financial aid for their subsistence. *Eisen v. Eastman,* 421 F.2d 560, 564 (2d Cir. 1969), certiorari denied 400 U.S. 841 (1970). The Second Circuit expressly adopted the position that welfare cases involve personal rights in *Johnson v. Harder,* 438 F.2d 7 (2d Cir. 1971).

In addition, however, the claimants have alleged separate deprivations of personal liberties which, in themselves, are sufficient to support federal jurisdiction under § 1343(3). *Sweeney v. Pennsylvania Dept. of Public Assistance Board*, 33 F. Supp. 587 (M.D. Pa. 1940), affirmed, 119 F.2d 1023 (3d Cir. 1941), certiorari denied, 314 U.S. 611 (1941).

With respect to claimants' statutory claims, the District Court has pendent jurisdiction. *Rosado v. Wyman*, 397 U.S. 397 (1970); *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968). The exercise of this jurisdiction is particularly appropriate in welfare cases based on a violation of the Social Security Act because the questions are essentially one of federal policy and law. *Rosado v. Wyman*, 397 U.S. 397, 404 (1970). Furthermore, the statutory questions herein are factually embraced within the constitutional issues. Thus, as in *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960), the assertion of non-constitutional claims in conjunction with a non-frivolous constitutional attack is sufficient to bring this case within the ambit of 28 U.S.C. § 2281, and a three-judge court can adjudicate all the claims.

IV.

EVEN IF THE COMPLAINT FAILS TO RAISE SUBSTANTIAL CONSTITUTIONAL QUESTIONS, THE DISTRICT COURT HAD JURISDICTION OF THE STATUTORY CLAIMS UNDER 28 U.S.C. §§ 1343(3) AND (4).

Even if this Court should decide that the complaint fails to raise substantial constitutional questions, claimants submit that the District Court had jurisdiction under 28 U.S.C. §§ 1343(3) and (4) of the substantial statutory issues raised therein. The extent to which federal courts may have jurisdiction over suits challenging AFDC provisions solely on the ground that they are inconsistent with the federal statute is undecided by this Court. *Rosado v. Wyman*, 397 U.S. 397, 405 n. 7 (1970); *King v. Smith*, 392 U.S. 309, 312 n. 3 (1968). (But see the discussion of these cases in

Section B, *infra*). In the District Court, defendants relied upon the case of *McCall v. Shapiro*, 416 F.2d 246 (2d Cir. 1969), for the proposition that there was no federal jurisdiction. The basis of the *McCall* decision is difficult to perceive since the court appears to have proceeded on the assumption that § 1983, rather than § 1343, is the section conferring jurisdiction and also appears to have relied heavily on the *Hague* distinction. As set forth above, jurisdiction over suits alleging a denial of welfare benefits is not precluded by this distinction. The *McCall* court dealt with the difference in language between § 1983 and § 1343(3) in one short paragraph (416 F.2d at 250) and reached its conclusion that the latter does not provide jurisdiction over all suits under the former without any discussion of the legislative history and policy considerations involved.

A. The Social Security Act Provides for Equal Rights, and, Despite the Difference in Language, Section 1343(3) Should Be Construed To Be Co-Extensive With Section 1983.

Section 1983 creates a cause of action for deprivations "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. There can be little doubt that this language entitles a welfare claimant to bring an action to ensure that his claim for benefits is considered in a manner which conforms to all statutorily mandated criteria and safeguards. *King v. Smith*, 392 U.S. 309 (1968), recognized that once a state elects to participate in the federal AFDC program, applicants and recipients have the right to insist that the state program comply with the federal statute. The problem arises because, while § 1983 embraces all "laws" of the United States, § 1343(3) grants jurisdiction of suits to redress only deprivations of rights secured by laws "providing for equal rights." This restrictive language does not preclude jurisdiction over statutory welfare claims since the Social Security Act does provide for equal rights through its recognition "that some persons, less than all, are suffering from inability to satisfy certain 'basic' wants which

presumably are felt by all alike." Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment,* 83 Harv. L. Rev. 7, 13 (1969). More importantly, the legislative history of these sections supports the conclusion that § 1343(3) is co-extensive with § 1983.[17]

Section 1983 originated in the Civil Rights Act of 1871. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. The original section was substantially in its present form except that it mentioned only rights secured by the Constitution of the United States. The district and circuit courts were given concurrent jurisdiction over actions under the section.

In 1875, a full-scale revision of the federal statutes was undertaken, and section 1 of the Civil Rights Act of 1871 became R.S. § 1979. In addition, as part of the consolidation of previous acts, § 1979 was enlarged to include deprivations of rights, privileges and immunities secured by federal laws as well as by the Constitution. The jurisdictional components of the 1871 Act were separated into R.S. § 563(12) and R.S. § 629(16). Section 563(12), providing for jurisdiction in the *district* courts, was identical to § 1979 in scope. Section 629(16), however, providing for jurisdiction in the *circuit* courts, was restricted to actions for deprivations of rights under "laws providing for equal rights." The purpose underlying the addition of this limitation is unexplained. Despite the difference in language, it nevertheless seems to have been the intent to provide a jurisdictional basis in both sections for actions under R.S. § 1977 (28 U.S.C. § 1981) and R.S. § 1979 (28 U.S.C. § 1983). Both jurisdictional statutes are cross-referenced by the Revisors to §§ 1977 and 1979. The close relationship between the jurisdictional statutes and § 1979 was also recognized by contemporary judicial opinion. In two of the Virginia coupon cases, *Carter v. Greenhow,* 114 U.S. 317

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[17]This history is fully discussed in Herzer, *Federal Jurisdiction Over Statutorily Based Welfare Claims,* 6 Harv. Civil Rights-Civil Liberties L. Rev. 1 (1970); Note, *Federal Judicial Review of State Welfare Practices,* 67 Colum. L. Rev. 84, 109-115 (1967); Note, *The Proper Scope of the Civil Rights Acts,* 66 Harv. L. Rev. 1285 (1953).

(1884), and *Pleasants v. Greenhow*, 114 U.S. 323 (1884), the construction of § 1979 and § 629(16) was at issue. While the precise question involved herein did not arise, there was a rather clear recognition of the concept that § 629(16) was merely the jurisdictional counterpart of § 1979. (114 U.S. at 320).

In the 1910 revision of the Judiciary Code, the two jurisdictional statutes were merged, original jurisdiction remaining only in the district courts. The new section retained the limitation found in § 629(16). There is no evidence, however, that Congress intended to diminish the prior jurisdiction of the district courts. To the contrary, the sparse legislative history suggests that the jurisdiction of the district court was to be equal in scope to that of the former to statutes. As stated in S. Rep. No. 388, 61st Cong., 2d Sess., pt. 1, at 15 (1910):

> "This paragraph merges the jurisdiction now vested in the district courts by paragraph 12 of section 563, and in the circuit courts by paragraph 16 of section 629, and vests it in the district courts."

This indicates that there was never any Congressional intent to restrict the scope of § 1983 by restricting federal jurisdiction under § 1343(3). Although the question was not discussed, this may have been the basis of Judge Hand's decision in *Bomar v. Keyes*, 162 F.2d 136 (2d Cir. 1947), certiorari denied 332 U.S. 825 (1947).

The relevant policy considerations fully support the nonrestrictive reading of § 1343(3). If the purpose of § 1983 is to provide a federal remedy that is truly "supplementary" to any state remedy, *Monroe v. Pape*, 365 U.S. 167, 183 (1961), then a narrow construction of the jurisdictional statute would defeat that Congressional purpose. In addition, those same factors which have led to the no-exhaustion rule under § 1983 dictate that a federal forum be available for statutory welfare cases. State administrative agencies are particularly inadequate to decide claims based upon a conflict between state and federal provisions. Actions involving

important interpretations of federal rights and expenditures of federal funds should, therefore, be adjudicated in the federal courts under § 1343(3).[18]

B. Jurisdiction Over Statutory Welfare Claims Exists Under Section 1343(4).

Section 1343(4) grants jurisdiction over actions "to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."[19] The decisions of this Court indicate that this language confers jurisdiction over statutory welfare claims. In *Rosado v. Wyman*, 397 U.S. 397 (1970), for example, the New York Social Services Law was attacked on constitutional and statutory grounds. The constitutional claim was declared moot, and the question on appeal was the power of the district court to adjudicate the pendent claim. In discussing the basis of that court's jurisdiction, it was stated that "once petitioners filed their complaint alleging the unconstitutionality of § 131-a, the District Court sitting as a one-man tribunal, was properly seised of jurisdiction over the case under §§ 1343(3) and (4) of Title 28 * * *." (397 U.S. at 403) Similarly, in *King v. Smith*, 392 U.S. 309, 312 n. 3 (1968), it was declared that "jurisdiction was conferred on the court by 28 U.S.C. §§ 1343(3) and (4)." Since § 1343(4) plainly does not cover deprivations of rights secured by the Constitution,

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[18]The fear of the Second Circuit that the assumption of such jurisdiction "would be to accept a federal court review over almost every ruling of the [state] Commissioner in the day-to-day operation of state welfare laws, regardless of the amount involved," *McCall v. Shapiro*, 416 F.2d 246, 250 (2d Cir. 1969), seems grossly over-stated. Under § 1983, federal jurisdiction can be invoked only when conflicts between state and federal laws exist. Violations solely of state welfare laws are excluded from § 1343 jurisdiction.

[19]The *Hague* distinction appears to have no validity under § 1343(4) since it provides jurisdiction for actions under 42 U.S.C. § 1982. *Jones v. Mayer Co.*, 392 U.S. 409 (1968).

jurisdiction under that section could have existed in the above cases only if statutory welfare claims are embraced within its language. This result can be reached either on the ground that the Social Security Act of 1935 is a law protecting civil rights or that § 1983 itself is such a law.

The former rationale is supported by the undisputed fact that welfare rights involve the "very means to subsist," *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969), and by the increasing recognition that society has an obligation to provide support to individuals without sufficient resources to live under conditions of health and decency. *Cf.* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255-56 (1965). The latter position was adopted in *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969), in which a group of migratory farm workers sought enforcement of the minimum wage and adequate housing provisions of the Wagner-Peyser Act of 1923. The Fifth Circuit found that the plaintiffs had stated a cause of action under § 1983 over which the federal courts had jurisdiction, saying:

> "* * * § 1343(4) does provide jurisdiction for all claims stated under § 1983 * * * [A]lthough operating as a conduit through which other statutory rights are protected, [§ 1983] is itself an 'Act of Congress providing for the protection of civil rights.'" (417 F.2d at 580 n. 39).

A similar result was reached in *Worrell v. Sterrett*, 2 Pov. L. Rep. ¶ 10,575 (N.D. Ind. 1969), which upheld § 1343(4) jurisdiction over a welfare claim requiring a county welfare department to rule upon AFDC applications within the thirty-day limit prescribed by the Social Security Act and the HEW regulations.

On the basis of the foregoing, therefore, claimants assert that the District Court had jurisdiction over their substantial statutory claims, regardless of the substantiality of the constitutional issues involved herein, under both sections 1343(3) and 1343(4).

CONCLUSION

The rights of the poor have frequently been before the courts in recent years. With respect to welfare claims, the federal courts have been predominant in protecting the rights asserted. This is both proper and natural since the welfare system is essentially federal in nature and since the claims advanced have been grounded upon either federal constitutional or statutory provisions. Indeed, for the welfare applicant or recipient a federal forum for obtaining relief from illegal state welfare practices is vital.

The complaint involved herein presents substantial constitutional and statutory questions which support federal jurisdiction under 28 U.S.C. § 1343 and render unnecessary any exhaustion of state administrative remedies. In failing so to recognize, the judgment of the District Court is contrary to the governing decisions of this Court and to a number of policies of federal importance. For these reasons, claimants pray that the judgment of the District Court dismissing their complaint be reversed and that the case be remanded for further proceedings.

Respectfully submitted,

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APPENDIX A

STATUTORY AND REGULATORY PROVISIONS INVOLVED

I

The action dismissed below challenged the combined effect of Indiana State Board of Public Welfare Regulations 2-400 and 2-402, Burns Ind. Admin. Rules & Regs. (52-1001)-1 and (52-1001)-2 (1967), which read as follows:

Reg. 2-400. *Definition-Dependent Child.*

(a) For the purpose of administration of assistance to dependent children, a dependent child means a needy child under the age of sixteen [16] years, or under the age of eighteen [18] years if found by the county department having jurisdiction of such child under the provisions of the Welfare Act of 1936, as amended, to be regularly attending school, who has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent, and whose relatives liable under the law for his support are not able to provide adequate care or support for such child without public assistance, and who is living with an eligible relative as listed in section 1(1), Part I of the Welfare Act of 1936, as amended, or regulation 2-401.

(b) Provided that a needy child who meets the provisions of subsection (a) above shall be considered eligible to receive assistance if such child is over the age of sixteen [16] years and under the age of eighteen [18] years, and, according to medical evidence, is physically or mentally unable to attend school.

(c) Provided further a needy child who meets the provisions of subsection (a) above shall be considered eligible to receive assistance if such child is over the age of eighteen [18] years and under twenty-one [21] years and is, according to school authorities regularly attending school for the purpose of completing his

high school education or regularly enrolled in an approved vocational or technical training program designed to fit him for gainful employment.

Reg. 2-402. *Continued absence from the home–Assistance to dependent children.*

(a) For the purposes of administration of assistance to dependent children, continued absence from the home shall mean that the child has been deprived of the support or care of either parent by reason of the desertion of a parent, separation of the parents, incarceration of a parent in a penal or correctional institution, or service of a parent in the armed forces of the United States.

(b) When the continued absence is due to desertion or separation, the absence shall have been continuous for a period of at least six [6] months prior to the date of application for assistance to dependent children; except that under exceptional circumstances of need and where it is determined that the absence of a parent is actual and bona fide an application may be filed and a child may be considered immediately eligible upon a special finding of the county department of public welfare setting forth the facts and reasons for such action.

(c) When the continued absence is due to incarceration in a penal or correctional institution, such absence shall have been continuous for a period of three [3] months prior to the date of application for assistance for the dependent child, except that a child becomes immediately eligible when the sentence of a parent plus the number of days required to serve out the fine and costs at $5.00 a day, equals ninety [90] days or more. When the parent is incarcerated, an application may be filed and a child may be considered immediately eligible upon a special finding of the county department of public welfare setting forth the facts and the reason for such action.

(d) When the continued absence is due to service of a parent in the armed forces of the United States, the child of such parent becomes immediately eligible

for assistance to dependent children if otherwise eligible.

II

State administrative appeals are governed by the provisions of Acts 1936 (Spec. Sess.), ch. 3, § 77, p. 12, Burns Ind. Stat. Ann. § 52-1246 (1964), and Indiana State Board of Public Welfare Regulation 2-113, Burns Ind. Admin. Rules & Regs. (52-1211)-1 (1970), which provide:

> § 52-1246.
>
> The county department shall at once report to the state department its decision upon each such application for assistance to a dependent child. If any such application is not acted upon by the county department within a reasonable time after the filing of the application, or if such application is denied, of if assistance previously granted is modified or revoked, the applicant may appeal to the state department in the manner and form prescribed by the state department. The state department shall, upon receipt of such an appeal, give the applicant an opportunity for a fair hearing thereon. The state department may also, upon its own motion, review any decision of a county department, and may consider any application upon which a decision has not been made by the county department within a reasonable time. The state department may make such additional investigations as it may deem necessary, and shall make such decision relative to the granting of assistance and the amount of the assistance to be granted as, in its opinion, is justified and in conformity with the provisions of this act [chs. 10-14 of this title]. All decisions of the state department made in conformity with the terms of this act shall be binding upon the county department involved and shall be complied with by such county department and shall have the same force and effect as decisions of the county department from which appeals are taken.

Reg. 2-113. *Appeals.*

(a) If the county department of public welfare refuses to accept an application for any type of public assistance as provided for in the Welfare Act of 1936 [Burns' Stat., § § 52-1001–52-1417], as amended; or any other law pertaining to public assistance; or if an application is not acted upon within the time limit established by the state department of public welfare and approved by the department of health, education, and welfare; or if an applicant or recipient is dissatisfied with the amount of the award; or if an application is denied; or if an applicant or recipient believes his civil or constitutional rights have been violated; or if an applicant or recipient believes that the state or county department's policies, including work requirements, are not reasonable or equitable and that these affect him adversely; or if the applicant or recipient believes that restrictions have been placed on his assistance payment that violate his right to an unrestricted money payment, the applicant or recipient may appeal to the state department of public welfare.

Such appeal shall be in writing over the signature of the applicant or recipient or person who is entitled to or who has been designated to act in his behalf and shall be filed with the county or state department of public welfare within 30 days following either the action or issue being appealed. Every applicant or recipient shall be notified of his right to appeal to the state department of public welfare at the time of his application, and concurrently with each grant, denial or modification of award.

(b) Upon the receipt of an appeal, the state department immediately will write the appellant, with a copy to the county department, acknowledging the request for an appeal and setting a date and place for such appeal hearing within three [3] weeks from the date of receipt of the request for an appeal. The county department will review the appellant's situation immediately and if an adjustment of the appealed

action is indicated will advise the appellant and the state department accordingly within two [2] weeks after the receipt of the notice of an appeal.

If the appeal is based on a denial of assistance because of a state department decision regarding permanent and total disability or blindness, the appropriate staff member of the state department will review the evidence on which the original decision was based. Additional medical and/or social information may be requested for use in reviewing the original decision.

The appellant may, if he desires to do so, withdraw his request for a hearing or postpone the hearing pending any adjusting action. If not, the hearing will proceed as scheduled.

(c) If the action taken by the county department, either prior to the hearing or as a result of the decision on a fair hearing corrects a previous agency action, the effective date of the correcting action shall be retroactive to the date the original incorrect action was effective. If a delay in action on an application is being corrected, the effective date of the correcting action shall be the first of the month following the month in which action should have been taken. If action is being taken to change an award because of a reported change in circumstances, the correcting action shall be retroactive to the first of the month following the month in which the action should have been taken.

If the state department reverses its decision regarding permanent and total disability or blindness either prior to the hearing or as a result of the additional medical evidence obtained in the hearing process, the county department, or in a blind assistance case the state department, will rescind the action taken on the application and promptly approve assistance retroactively to the first of the month following the month in which the original action was taken, if the appellant was otherwise eligible.

(d) Any fair hearing shall be held at a place convenient to the appellant in the county in which he resides and shall be conducted by an official or employee of the state department of public welfare duly designated to hold such hearings. The hearing shall be informal and shall provide an opportunity for all persons who have pertinent information to be heard promptly. The appellant may be represented by any person of his own choice, including legal counsel if he so desires. The appellant or his representative shall have full opportunity to question or refute any evidence presented by the state or county department and to examine all documents and records used at such hearing, and said departments shall have the same opportunity as the appellant.

The hearing officer, with the consent of the appellant or his representative, may continue the hearing in order to secure additional information pertinent to the case, or the appellant or his representative may request a continuance in order to obtain such information.

(e) When the issue of the appeal involves a medical determination regarding disability, incapacity of a parent, or the ability of an assistance to dependent children family member to take employment, the appellant shall be given an opportunity to obtain a new medical evaluation from a medical source satisfactory to him and to the state and county department of public welfare. Such medical evaluation shall be secured in accordance with the provisions of the county medical plan. The hearing officer will consider the medical evidence in the record presented at the hearing and may request additional medical evidence. The assessment of such medical authorities will be reported in writing or by personal testimony as an expert witness for the hearing record. The medical assessment must be from a person or persons other than those involved in the original decision.

When the appeal is based on blindness or degree of vision, the supervising opthalmologist shall

designate an appeal examiner and the consultant for blind assistance and eye treatment will arrange for the eye examination and report.

The results of the examination shall be provided the hearing officer and the hearing continued with the appellant being notified of such decision and his right to a further review by the state board of public welfare.

(f) Within three [3] weeks after the conclusion of a fair hearing, the person who conducted the hearing shall report his findings of fact and decision upon the hearing. Such appeal decisions will be based on the law, rules and regulations of the state department of public welfare, and officially adopted policies and shall be signed by the administrator or a designee of the administrator and/or the director of the division of public assistance. A copy of the decision shall be sent to the appellant and to the county department of public welfare within two [2] weeks of the date of receiving the report of the hearing officer. The appellant shall also be notified that the state board of public welfare will review his case personally if a specific request is received by the state department from either the appellant or the county department of public welfare within 10 days following the receipt of the appeal decision.

(g) The decision of the state department of public welfare shall be binding upon the county department of public welfare and shall be acted upon immediately by the county director or the county board following the receipt of the decision. The effective date of the action shall be set forth in the decision.

The county department shall notify the state department within 48 hours of the action taken. Such decision of the state department does not preclude the county department of public welfare from modifying the award thereafter, under the provisions of the Welfare Act of 1936, as amended, to meet changed conditions.

(h) The appellant may withdraw his appeal at any point in the procedure by submitting a signed request to the state department of public welfare.

III

The provisions of the Social Security Act of 1935 which are particularly relevant to this appeal are § 402(a)(10), 49 Stat. 627, 42 U.S.C. § 602(a)(10), and § 406(a), 49 Stat. 629, 42 U.S.C. § 606(a), which provide:

§ 402(a)(10).

(a) A State plan for aid and services to needy families with children must * * * (10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals * * *.

§ 406(a). When used in this part–

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment * * *.

IV

The action was brought pursuant to the provisions of 42 U.S.C. § 1983, and the jurisdiction of the District Court was invoked under 28 U.S.C. § 1343(3) and (4), which statutes provide:

> § 1983.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> § 1343
>
> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

V

Appellants contended below that the Indiana regulations and practices conflict with the First, Fourth and Fourteenth Amendments of the Constitution of the United States, which provide:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

The 1971 Indiana General Assembly completely recodified the laws of the State of Indiana in adopting the Indiana Code of 1971. This Code is presently effective, but has not yet been published. The following table cross-references the sections of Burns Indiana Statutes Annotated cited herein to the corresponding provisions of the Code.

Burns Sections	*Code*
3-1203	Title 31, Art. 1, Ch. 12, Sec. 2
3-1231	Title 31, Art. 1, Ch. 22, Sec. 4
52-144	Title 12, Art. 2, Ch. 1, Sec. 1
52-148	Title 12, Art. 2, Ch. 1, Sec. 6
52-150	Title 12, Art. 2, Ch. 1, Sec. 8
52-1113	Title 12, Art. 1, Ch. 2, Sec. 12
52-1240	Title 12, Art. 1, Ch. 7, Sec. 1
52-1241	Title 12, Art. 1, Ch. 7, Sec. 3
52-1242	Title 12, Art. 1, Ch. 7, Sec. 5
52-1243	Title 12, Art. 1, Ch. 7, Sec. 6
52-1246	Title 12, Art. 1, Ch. 7, Sec. 9
52-1247	Title 12, Art. 1, Ch. 7, Sec. 10